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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-233

ROBERT J. DeCHIARO,
ROBERT G. LUTZ,
PETITIONERS,

v.

THE STATE OF NEW YORK,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

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THE STATE OF NEW YORK,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

The petitioners Robert J. DeChiaro and Robert G. Lutz respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department entered in this proceeding on May 12, 1975.

Opinion Below

The opinion of the Appellate Division, not yet reported, appears in the Appendix hereto. No opinion was rendered by the State of New York of Appeals.

Jurisdiction

The judgment of the Supreme Court, Appellate Division, Third Judicial Department was entered on May 12, 1975. It appears in the Appendix. On May 16, 1975 the Honorable Hugh R. Jones, Associate Judge of the Court of Appeals of the State of New York denied petitioners timely application for a certificate of appeal to that Court. It also appears in the Appendix. Thereafter, within 90 days of that date this petition for certiorari was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether petitioners were denied the assistance of counsel in their defense as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United Staates.

2. Whether the trial court's refusal to permit the introduction of evidence of alleged brutality inflicted upon the petitioners by New York State Troopers who were prosecution witnesses and evidence of a civil rights action instituted by petitioners against the arresting officers to show bias or hostility deprived petitioners of their right to confrontation and cross-examination as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved

United States Constitution:

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

Amendment XIV.

". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

In May, 1973, the petitioners were indicted by a Rensselaer County grand jury, indictment No. C-4224 and charged with the crimes of burglary in the first degree and attempted robbery in the first degree. Petitioners were convicted on September 16, 1974 of both counts following a jury trial in which neither petitioner was represented by counsel. Petitioners were sentenced on September 30, 1974, to indeterminate terms not exceeding 25 years on the burglary conviction and to concurrent indeterminate terms not exceeding 15 years on the robbery convictions.

Thereafter, petitioners appealed to the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, and by decision dated May 8, 1975, and entered May 12, 1975, petitioners' convictions were affirmed. On May 16, 1975, petitioners' application for a certificate of appeal to the Court of Appeals of the State

of New York was denied by the Honorable Hugh R. Jones, Associate Judge of that Court.

Following their arrest in January 1973, petitioner Lutz retained attorney E. Stewart Jones, Jr., and petitioner DeChiaro retained attorney Thomas J. O'Connor, both of Troy, New York. Counsel for petitioners made various pretrial motions including a motion to suppress their alleged confessions made following their arrest and allegedly coerced through brutal beatings inflicted by numerous New York State Troopers.

On September 5, 1974, defense counsel were advised by Judge Clyne (Albany County Court Judge, who had been assigned to Rensselaer County Court to preside over the instant trial since newly elected Rensselaer County Judge Cholakis had been the District Attorney at the time of the return of the instant indictment), that the confession suppression hearing scheduled for September 6, 1974, would not be held since the prosecution had made known its intention not to offer the alleged confessions as either direct or rebuttal evidence.

Defense counsel were advised at the same time that the trial would commence on September 9, 1974, despite the fact that the Special Prosecutor, Mr. Shanley had not yet fully complied with a previously granted defense Motion for Discovery and Inspection. Nor had two other pending motions for suppression of Identification Testimony and Dismissal of the Indictment for selective and discriminatory prosecution yet been ruled on.

On September 7, 1974, an Order To Show Cause staying the trial pending a Change of Venue Application was signed by the Honorable Michael Sweeney, an Associate Justice of the Appellate Division, Third Department. Upon being so advised, Judge Clyne scheduled September 9, 1974 for a Supression Identification Hearing. On the afternoon of September 9, 1974, while said Suppression Identi-

fication Hearing was in progress, Judge Clyne denied the motions to dismiss the indictment. At 1:30 P.M. on that day, arguments had been heard by the Appellate Division, Third Department, on the Change of Venue Application which was subsequently denied by that Court at approximately 4:30 P.M. on September 9, 1974.

On Tuesday morning, September 10, 1974, immediately prior to the resumption of the Identification Suppression Hearing, the petitioners advised their attorneys that they wished to discharge them and retain new counsel, with petitioner Lutz assigning as one of his reasons therefor the appearance of conflict in interest arising out of the continuing responsibility of Attorney Jones as Special Prosecutor in Rensselaer County. At this time, Mr. Shanley had still not provided defense counsel with a copy of the New York State Police Laboratory Analysis of the hair samples in compliance with the terms of the Discovery Order entered on July 6, 1974, which was believed to reflect critical exculpatory evidence for the petitioners.

At the commencement of proceedings on September 10, 1974, defense counsel advised Judge Clyne of their having been discharged by the petitioners and further stated that they had been told by the petitioners of the retention of the Law Office of F. Lee Bailey, Esquire, of Boston, Massachusetts, to represent them for that point on. A request for a continuance of the hearing then in progress was made by Attorney Jones in order to facilitate the change of counsel. Judge Clyne denied the motion labelling it as "frivolous" and a "fraud upon the Court." Judge Clyne offered the petitioners the alternatives of either conducting the hearings pro se, or of producing an attorney from the Bailey Office in Court "within the next fifteen minutes." When advised of the impossibility of effectuating the latter alternative Judge Clyne recessed for five minutes during which time he directed that the petitioners decide either

to continue pro se or with their original defense counsel. When Court resumed, subsequent to the five minute recess, Judge Clyne advised that as a result of a telephonic contact with the office of Attorney Bailey, it was his understanding that a member of the Bailey firm would be present the following morning prepared to commence jury selection. With the petitioners insisting on their right to be represented by new counsel, the Court directed that the Suppression Identification Hearing be resumed with the petitioners representing themselves. The colloquy between Judge Clyne, defense counsel and petitioners, pertaining to this issue is reflected on pages 144 through 156. Judge Clyne discharged Attorneys Jones and O'Connor from the case and when the petitioners stated to him that they did not wish to represent themselves, declared "you are just going to sit here; that is what you are going to do." (T.T. 155, 156).

Excerpts from the trial transcript reveal the following relevant exchanges:

> Mr. Jones: It is my understanding that I have been effectively discharged as Mr. Lutz' attorney.
>
> The Court: Very well, then Mr. Lutz can conduct the matter himself or he can have Mr. Bailey here within the next fifteen minutes.
>
> Mr. Jones: Obvously, that's an impossibility, Judge, from Boston to Troy.
>
> The Court: That is not. If he spoke with Mr. Bailey last night and advised him this hearing was on this day, if Mr. Bailey was going to effectively represent his client he would have been here this morning. Now, who's kidding who? That's it.

(T.T. 146). Thereafter the Court declared that the trial would commence the following day and ordered a five minute recess for counsel to decide "whether you will

continue to represent your clients for the balance of this hearing or whether they want to represent themselves." (T.T. 147).

When the hearing resumed the Court addressed defense counsel:

> The Court strongly recommends that respective counsel continue to fulfill their professional responsibilities in this matter for the balance of this date so there will be an orderly transition of the file from the old counsel to the new counsel who will be here, because in no event will the trial of this case be further delayed.

(T.T. 148). Counsel responded that their clients continued to move for a continuance until new counsel could be present. (T.T. 149, 150). Counsel further indicated that petitioners desired to be heard and the following colloquy ensued:

> Defendant Lutz: Your Honor, because of Mr. — I come to the conclusion, because of Mr. Jones being a special prosecutor, he — there is a conflict of interests.
>
> The Court: Who are you kidding? Mr. Jones was special prosecutor when? When I was here in June with Shaw? It took you from that time to this time to make that determination? Do you want to continue to have Mr. Jones continue to represent you for the balance of this hearing or do you want to represent yourself?
>
> • • •
>
> Defendant Lutz: Your Honor, he is not the lawyer of my choice.
>
> The Court: Very well. Then you will represent yourself. Fine. You wish to make a statement, Mr. DeChiaro?

Defendant DeChiaro: I feel, Your Honor, the association between Mr. O'Connor and Mr. Stewart Jones is the same. I don't believe I can represent myself. I don't have the law behind me to do so. I would like to have this on the record, that's all.

The Court: Very well. I would strongly urge you to have Mr. O'Connor represent you for the balance of this suppression hearing.

Defendant DeChiaro: What if we don't get the suppression hearing?

The Court: I am giving you the suppression hearing pursuant to the motion made by your counsel. Do you wish to withwraw your motion for a suppression hearing?

Defendant DeChiaro: No.

• • •

The Court: Very well. We will continue with the suppression hearing. Now, gentlemen, please; this matter involves an alleged crime committed on January 28, 1973. The indictments in this case were returned May 1, 1973. This is now September 10, 1974; more than ample time has passed for defendants to have made their choice of counsel. As you are well aware, you are represented by extremely competent counsel and you have made that choice yourself from the very beginning in this case. In addition, the argument about Mr. Jones having been a special prosecutor falls on deaf ears for the reason that Mr. Jones —

Defendant DeChiaro: I am not saying that, Your Honor.

The Court: I will spell it out for you. I am not impressed with the argument. Mr. Jones was special prosecutor in June of 1974. This is September. . . . This Court has come to the conclusion that the tactic seeking a change of venue was for the purpose

of delay. . . . This Court is of the further opinion that the last-minute switch of attorneys on the very eve of trial is for the same reason. Delay will no longer be tolerated in this case.

Defendant DeChiaro: Your Honor —

The Court: This case is now scheduled to begin tomorrow morning at 9:30 with the selection of a jury, and all things being equal and God willing such will happen.

Defendant DeChiaro: Your Honor, it hasn't been brought to my attention until I read in the papers the other day next to a murder trial, he is the prosecuting attorney, and our case is defense.

The Court: That's been in the papers for all this past year. Very well, Mr. DeChiaro, you have had your statement. Do you wish to say anything further?

Defendant Lutz: I do, Your Honor.

• • •

I retained Mr. Jones as my lawyer. He was a [defense] lawyer. A few months ago he began special prosecutor. He changed his status.

The Court: He was appointed special prosecutor in this county in March of 1974. Now please stop trying to flimflam the Court.

Defendant Lutz: I am just saying there is a conflict of interests, and I don't want him for my attorney. That's all I have to say.

The Court: That's very good.

Defendant Lutz: Today either.

The Court: You do not wish to have either —

Defendant Lutz: All he wants is a twenty-four hour continuance until tomorrow. Mr. Alch will be here tomorrow morning.

The Court: Mr. Alch will be here tomorrow morning to begin selection of a jury. We are going forward

with this suppression hearing. We are going forward at this time with or without counsel.

Defendant DeChiaro: If that's the way it's got to be, that's the way it's got to be.

The Court: *You wish to represent yourself?*

Defendant DeChiaro: *We don't wish to represent ourselves.* Our rights are being denied further.

The Court: Is that your position?

Defendant Lutz: That's our position.

The Court: Fine. Mr. Jones and Mr. O'Connor are not going to represent you for the balance of this suppression hearing?

Defendant Lutz: No.

The Court: Very well. Is that the same with you, Mr. DeChiaro?

Defendant DeChiaro: The same.

The Court: Very well. In view of the statements of the defendants, Mr. Jones and Mr. O'Connor, you are discharged from further service in this case. Very well. Call your next witness, please, Mr. Shanley.

Defendant Lutz: *We are not going to represent ourselves either.*

The Court: You are just going to sit here; that's what you are going to do.

Defendant Lutz: We don't wish to carry on with the suppression hearing.

The Court: You don't have anything to say about it. Take your seat.

(T.T. 150-156).

The hearing continued and was concluded on September 10, 1974 in the absence of the petitioners being represented by counsel as hereinabove set forth. Petitioners continued to object, for the balance of the hearing, that they were not represented by counsel.

Attorney Gerald Alch, then of Mr. Bailey's Law Firm had booked passage on an Allegheny Airlines Flight from Boston to Albany, scheduled to arrive in Albany at 7:42 a.m. on September 11, 1974. This flight was cancelled because of the Albany airport being closed due to fog. At approximately 9:15 a.m. on September 11, 1974, Alch telephoned Judge Clyne and explained the problem to him, stating that he had acquired passage on the next available flight which was scheduled to arrive in Albany at approximately 3:25 p.m. Judge Clyne replied to Alch that he had a problem in that the case was scheduled to commence trial on that day and that he had, on the day before, permitted defense attorneys of record to withdraw. He further stated that the problem was compound because he "didn't know whether Alch was in or out of the case" and he presumed that Alch "would not be willing to represent the defendants without getting paid." Alch responded that the primary factor was whether or not he could obtain a continuance in order to adequately prepare for the case. Judge Clyne stated that jury picking had been scheduled to commence that morning but that he might consider a delay with regard to the introduction of evidence until Monday, September 16, 1974. Alch stated if he could receive more time whereupon Judge Clyne stated that he would further discuss the matter with Alch in chambers that afternoon.

Before leaving for Albany on September 11, 1974, Alch telephoned Attorney Jones for the purpose of obtaining general information regarding the case which would serve as a predicate for an evaluation of the minimum time necessary for preparation. Discussed was the fact that the petitioners had instituted a civil rights action in the United States District Court in Albany, New York against several New York State Troopers, the arresting officers in the case, based upon alleged vicious and brutal assaults at the time of and immediately subsequent to the arrest of the peti-

tioners. It was the opinion of both Jones and Alch that evidence of this alleged brutality would be admissible, the non-proffer of the alleged confessions by the prosecution notwithstanding, on the issue of hostility, interest and bias on the part of the arresting officers (defendants in the civil suit) whose alleged identification of the petitioners at the time of the charged offense was a crucial issue in the case. Jones further advised Alch that in order to adequately prepare for trial it would be necessary to review a preliminary hearing transcript of approximately two hundred pages, a transcript of the Identification Suppression Hearing (which was not yet available) to interview deputy sheriffs who had allegedly observed the condition of the petitioners upon their delivery by the State Police for booking purposes, to interview doctors who had treated the petitioners during their post-arrest hospitalization, to interview reporters under whose by-line newspaper articles had appeared purporting to quote several of the arresting officers in statements inconsistent with testimony adduced at pre-trial hearings, to interview FBI Agents who had investigated the charges of brutality, to review all pertinent hospital records, as well as all records obtainable relating to the investigation by the FBI and by the Internal Affairs Division of the State Police. Accordingly, Alch concluded that the minimum time necessary for preparations sufficient for adequate representation would be seven (7) calendar days.

At approximately 3:45 p.m. on September 11, 1974, Alch, his associate, John A. Daly, Esquire, and Shanley met with Judge Clyne in Chambers. Alch explained to Judge Clyne the basis for his continuance request of seven calendar days, as hereinabove set forth. Judge Clyne stated that evidence of the alleged State Police brutality was inadmissible in view of the alleged confessions having been voluntarily suppressed by the prosecutor. Judge Clyne further

stated that such evidence would also be refused on the issue of prejudice or bias of any testifying State Trooper who had been named as defendants in the Federal Civil Action, Alch responded that it would be his obligation, in the event of such an evidentiary ruling during trial, to make an offer of proof, as specific as possible, as to the substance of the proffered testimonial documentary evidence with regard to the alleged brutality and its alleged relevancy to the bias of prosecution witnesses. Judge Clyne stated that a defendant did not enjoy the privilege of making an offer of proof, and that same was afforded only to the prosecution. Alch respectfully disagreed and requested a continuance until Thursday, September 19, 1974, avowing to devote his efforts exclusively during this period of time to the preparation of the instant trial. Judge Clyne stated that jury selection would commence the following day, September 12, 1974, which he assured would be completed by 2 p.m. of that day. Alch stated that his requested preparation was necessary for the proper formulation of voir dire questions to the Petit Panel and that in any event, completion of jury selection could not be guaranteed by 2 p.m. on the day said process was to commence. Judge Clyne told Alch that all he had to do was enter his appearance, request a continuance for the record, which he would deny, and that Alch would thereby "be protected." Alch stated that his concern was for the protection of the petitioners and that it was probable that jury selection would run into Friday, September 13, 1974, which even if completed on that day, would afford him only the two days of the weekend to prepare and interview many witnesses whose weekend availability was uncertain. Judge Clyne told Alch that if his best efforts were exerted, the defendants would thereby be afforded a fair trial; to which Alch replied that the question of preparation was a subjective matter of conscience and that he could

not assume the responsibility of two young defendants faced with Class B felonies unless he felt personally ready to proceed. Judge Clyne ended the discussion by stating that he did not grant the request for a continuance of seven calendar days and gave Alch thirty minutes in which to reach a decision with regard to his representation of the petitioners.

Alch went to the office of Jones who advised that on the day before, when the petitioners had discharged him and O'Connor in open court, Judge Clyne's immediate reaction had not been to permit their withdrawal but was rather to telephonically contact Attorney Bailey in Boston. It was subsequent to this conversation, in which Bailey professed to have no knowledge of the situation, that Judge Clyne returned to open court and allow the attorneys of record to withdraw.

Alch returned to Judge Clyne's chambers at 5:15 p.m. and advised of his decision, under the circumstances, not to enter his appearance on behalf of the petitioners. Judge Clyne directed Alch to summon Attorneys Jones and O'Connor as well as the petitioners to his courtroom. While awaiting their arrival, having emerged from Judge's Chambers, Judge Clyne beckoned Alch, alone, back into his office. Attorney Daly accompanied Alch into chambers whereupon Judge Clyne stated, in the absence of Mr. Shanley, that if Alch refused to then enter his appearance, he would seriously consider forwarding a copy of the record about to be made in open court to the Massachusetts Bar Association, citing Alch for unprofessional conduct.

All parties then proceeded to the courtroom for the purpose of making a record of all that had transpired. (Transcript of September 11, 1974, proceedings [hereinafter cited as T 11.]).

When attorney Alch refused to enter his appearance on the grounds that adequate time for trial preparation of

seven days was denied, Judge Clyne directed that attorneys Jones and O'Connor, who were present in the courtroom, resume representation of the petitioners. Almost immediately thereafter Judge Clyne reversed himself and withdrew this direction.

Defendant Lutz: I discharged my lawyer for what I thought, and what I still do think, on the very valid grounds—

The Court: (Interrupting) Very well.

Defendant Lutz: (Continuing) —in the conflict of interests.

The Court: I don't agree with you and there is not any conflict of interests. In any event, do you want to reconsider, go forward with Mr. Jones and Mr. O'Connor respectively, gentlemen, or no?

Defendant Lutz: The lawyer of my choice is Mr. Alch.

The Court: Well he does not appear to have the same feeling.

Defendant Lutz: May I speak, Your Honor?

The Court: Make it brief.

Defendant Lutz: I am in a position to obtain Mr. Alch as my attorney and I understand if he has the proper time to prepare this case—

The Court: (Interrupting) That is water over the dam, I have decided that already. We are going to draw a jury in this case tomorrow morning. Get to the point.

Defendant Lutz: I don't have a lawyer.

The Court: Then you be here tomorrow morning ready to try it yourself.

How about you?

Defendant DeChiaro: I don't have a lawyer and I do not intend to be here tomorrow.

The Court: You be here in the morning and try it yourself.

Under the circumstances I am appointing Mr. Jones to aid and assist Mr. Lutz during the trial of this case. The degree of cooperation will depend upon the defendant's own choice. I am also designating Mr. O'Connor to aid and assist Mr. DiChiaro in the trial of this case and the degree of cooperation will depend upon the defendant's own actions.

Male Voice: May I speak to the Bench—

The Court: You open your mouth and you will be in Contempt of Court.

Mr. Jones: Your Honor, in the face of the discharge—

The Court: (Interrupting) Mr. Jones, the Court has designated you—

Mr. Jones: I don't see how I can accept the appointment.

The Court: I don't think you have any choice, I designated you to do so.

Mr. Jones: I think you have exceeded your authority. I ask for an opportunity to appear before the Appellate Division to pass upon it.

The Court: I am not going to give you that opportunity, you are the attorney best able to aid and assist this defendant—

Mr. Jones: (Interrupting) I disagree, I am presently discharged from this case, discharged with the sanction of the Court—

The Court: That is true but times have changed and we are right back again.

Mr. Jones: You are appointing me to represent —to appear for someone who has discharged me?

The Court: Do you object?

Defendant Lutz: I strongly object.

The Court: Do you strongly object?

Defendant DeChiaro: I do object.

The Court: Gentlemen you are on your own, you have no attorney, you are on your own.

You will be here tomorrow morning at 10:00 a.m., we select a jury in this case. That's all.

Defendant Lutz: You mean that I have to defend myself in a criminal action?

The Court: That is it exactly.

Defendant DeChiaro: You are telling us that we have to defend ourselves?

The Court: That is exactly what I am telling you. (T. 11. 25-29).

Trial of the petitioners commenced with jury selection on September 12, 1974 without the petitioners being represented by counsel. During the course of the trial, whenever Judge Clyne inquired of the petitioners as to whether they wished to participate via cross-examination, objections, etc., the petitioners constantly repeated, on at least seventy-two (72) occasions, their desire to be represented by adequately prepared counsel, other than Attorneys Jones and O'Connor, whom they had discharged.

At one point, during trial, the record reflects that the petitioners stated to Judge Clyne that if they were represented by adequately prepared counsel, they would request that he attempt to introduce evidence of the alleged State Trooper brutality on the issue of bias on the part of the prosecution witnesses. The response of Judge Clyne was to the effect that this matter had already been judicially adjudicated in the negative. This colloquy is reflected on page 333 of the trial transcript.

There were also several instances during trial where competent counsel, it must be assumed, would have posed objections with regard to the manner in which the trial

was prosecuted, which objections, it is respectfully submitted, would or should have been well taken. Upon the return by the jury of a verdict of guilty on September 16, 1974, the petitioners were immediately remanded by Judge Clyne until their release pending appeal by Associate Justice T. Paul Kane of this Court on September 17, 1974.

By decision dated May 8, and entered May 12, 1975, the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, affirmed petitioners' convictions in a decision which appears in the Appendix hereto. That Court held that, "Prior to the commencement of the trial, the defendants elected to proceed without counsel although during the voir dire they attempted to change their position. The trial commenced the next morning without defense counsel and the defendants, not participating in the trial, were convicted . . . ." further, the Court held that petitioners had discharged their attorneys without good cause and that "Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel."

The Appellate Division also ruled that the issue of the admissibility of the alleged brutality of the arresting officers and the institution of the Civil Rights Action by petitioners could not be raised upon appeal since it "never became a subject of a formal ruling . . . ."

Reasons for Granting the Writ

I. The Decision Below Raises an Important Question of Federal Constitutional Law as to the Proper Interpretation of the Sixth Amendment Right to Counsel, Conflicts With the Decisions of the Lower Federal Courts, and Should Be Settled by This Court.

The Sixth Amendment to the Constitution of the United States guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

This mandate is of course binding upon the states. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). While recognizing that a criminal defendant has a right to counsel under the New York Constitution (N.Y. Const., Art. I, §60) the ratione decidendi of the Appellate Division was a waiver of this right. "Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel . . . ."

The question of an effective waiver of a federal constitutional right, however, is itself a federal standards question. *Boykin* v. *Alabama,* 395 U.S. 238, 243 (1969); *Des Bouillons* v. *Burke,* 418 F.2d 297 (7th Cir. 1969).

With respect to the issue of waiver, this Court long ago stated that courts must "indulge every reasonable presumption against waiver," and cannot "presume acquiescence in the loss of fundamental rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). In *Carnley* v. *Cochran,* 369 U.S. 506, 515 (1962), the Supreme Court expressly declared that "the principles declared in *Johnson* v. *Zerbst* [are] equally applicable to asserted waivers of the right to counsel in state criminal proceedings." More specifically, with respect to the right to counsel, the federal courts have consistently held that "The law requires 'an unequivocal request' to waive counsel by the defendant who wishes to act as his own lawyer." *Soto* v. *United States,* 369 F.Supp. 232, 236 (E.D. Pa. 1973), citing *United States* v. *Fay,* 364 F.2d 219 (2d Cir. 1966); *Meeks* v. *Craven,* 482 F.2d 465 (9th Cir. 1973).

The *Meeks* Court found no waiver of the right to counsel in spite of the following colloquy:

> The Court: You still want to represent yourself?
> The Defendant: Yes, Your Honor, I think I will.

The Court held that "Meeks' 'I think I will' is a prototype of equivocation." *Id.* at 467. The facts of the instant case establish that there was not present even that express equivocal waiver of counsel by petitioners who emphatically and frequently stated that they would not represent themselves.

The Appellate Division, in affirming petitioners' convictions, did not purport to find an *actual* express waiver of the right to counsel in the instant case. Rather, the Court concluded that petitioners' actions in discharging their counsel without good cause on the day preceding trial and then refusing to assert any defense were *equivalent* to an express waiver of counsel.

The United States Court of Appeals for the Fourth Circuit was presented with an almost analogous situation in *Patton* v. *State of North Carolina,* 315 F.2d 643 (4th Cir. 1963). There, a criminal defendant who dismissed his employed counsel on the day of trial after having been told that his trial would commence that day, with or without counsel, was held not to have waived his constitutional right to the assistance of counsel to defend charges of armed robbery.

The *Patton* Court citing *Johnson* v. *Zerbst, supra,* held that effective waiver of counsel cannot be implied and concluded that

> He [Patton] then attempted to procure the services of other counsel. This effort, which was made with full knowledge of the trial court, was unsuccessful but it served to emphasize Patton's desire for and realization of the need of the assistance of counsel. We conclude that Patton could not reasonably be held

> to have intelligently and understandingly waived a constitutional right which he, at the very moment of being put to trial, continued to assert.

Patton, at 646. The Court also found it significant in *Patton* that he had not previously sought any continuances. So in the instant case, the record reflects that neither petitioner had previously sought continuances of the trial date and the continuance eventually sought and refused was for a period of seven days.

> [U]nder such circumstances, the convenience of the court, the jury, the prosecutor or the witness for the prosecution should not be deemed a consideration of sufficient importance to override the preservation of the constitutional right of the accused.

Patton, at 646. *Accord, United States* v. *McMann*, 252 F.Supp. 539, 545 (N.D.N.Y. 1966). "Court or prosecution conveniences are to be of secondary consideration in the search for the overriding or waiver of this important right [to counsel]."

In *McMann*, a habeas corpus proceeding, the defendant discharged his attorney on the second day of trial after being informed that if he did so he would have to proceed alone. The trial court there also was convinced that it was a tactic employed for purposes of delay. The trial court, however, subsequently adjourned the trial from October 17, to October 22, to permit the defendant to retain other counsel. On the 22nd the defendant still had not been able to retain other counsel and the court offered him the services of a Legal Aid Society attorney with one hour to familiarize himself with the case. This offer the defendant expressly refused. The court adjourned again until October 24th at which time, in contradistinction to

the instant case, the defendant actively attempted to represent himself.

In finding no waiver of the right to counsel the *McMann* Court stated:

> It would add unnecessarily to this writing to particularize all the instances in the trial record which show this petitioner with a two or three-year high school education was inept and amateurish in defending himself in a court of law at a jury trial against a trained prosecutor.

Id., at 544.

> The right to counsel is basic and the right to choose one's own counsel is a vital element in that right. [citation omitted]. Court or prosecution conveniences are to be of secondary consideration in the search for the overriding or waiver of this important right. [citation omitted]. The balancing considerations, troublesome, as noted often, are that the right of counsel cannot be manipulated so as to interfere with the fair administration of justice, *but the defendant must have complete confidence in counsel and hence, a change, if it occurs, or even a discharge, will usually point to a continuance.*
>
> . . .
>
> Of course, the right to counsel cannot mean continual delay of discharging counsel and refusing to select a new lawyer to defend, but the desire for expedition can furnish no justification for the subversion of the Sixth Amendment to present an effective defense through counsel. [citation omitted].

Id., at 545. (Emphasis added).

Moreover, in affirming petitioners' convictions in the instant case it appears that the Appellate Division did so in no small part because "In view of the overwhelming proof of the guilt of the defendants apparent from this record, the convictions should not be overturned." It has long been established, however, that

> Justice Frankfurter explained our judicial policy now fully accepted in constitutional challenges of this kind. Determinations must be influenced by certitude of guilt or by the fact that the defendant is a bad man with a long criminal record.

McMann, at 546 citing cases.

United States v. *Fay*, 364 F.2d 219 (2d Cir. 1966); and *United States* v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964), also lend strong support to petitioners' claim that they were denied their constitutional right to counsel.

Curtiss, holding that there was no waiver of the right to counsel by the Appellant there observed that:

> Curtiss' statements indicate that while he was unhappy about his relationship with [his attorney], he certainly had no wish to try the case himself but felt 'that he had no choice.'

Id., at 280. In *Curtiss*, the defendant had stated to the trial judge in chambers "But I have no choice. O.K., I will go along." *Id.* at 279. So in the instant case, when petitioners were informed that "We are going forward at this time with or without counsel," (T.T. 154-155), they responded "if that's the way it's got to be, that's the way it's got to be." (T.T. 155). Additionally, petitioners on numerous occasions emphatically indicated that they did not desire to, and would not, represent themselves.

As the *Fay* Court stated in finding no waiver of the right to counsel by a defendant who had discharged his attorney after the commencement of the trial:

> On the contrary, appellee continued to insist on hiring a [new] lawyer. He did not indicate any desire to proceed pro se; indeed, he insisted that he would not proceed alone.

United States v. *Fay*, 364 F.2d 219, 222 (2d Cir. 1966).

Finally, even if the Appellate Division was correct in its holding that the instant petitioners discharged their attorneys without good cause, then, and in that event, the trial court committed reversible error in permitting the attorneys to withdraw their appearances on the day before trial unless and until new counsel had entered his appearance. *Soto* v. *United States*, 369 F. Supp. 232 (E.D. Pa. 1973).

It is well recognized that a trial judge need not permit counsel to withdraw on the eve of a trial, because of the dissatisfaction of his client, in the absence of good cause shown. Indeed, to do so may be clear reversible error. The case of *Soto*, *supra*, is almost exactly on point.

In *Soto* the defendant, after conferring with other attorneys, became dissatisfied and attempted to discharge his two court-appointed attorneys on the day the case was called for trial. The trial judge refused to grant counsels' motions to withdraw until such time as other counsel was actually substituted:

> I am going to insist that [counsel] remain, that they will represent you to the best of their ability whether you like it or not.

Id. at 234. The defendant Soto subsequently appealed his conviction on the ground that he was not advised of his

right to proceed pro se. In affirming the conviction, the Court observed that:

> . . . the only fair inference which could be drawn was that Soto might be contemplating a *change* of counsel, not that he desired to dispense with counsel and represent himself. . . . The law requires 'an unequivocal request' to waive counsel by the defendant who wishes to act as his own lawyer. [Citations omitted]. On this record, *to have permitted* [counsel] *to withdraw and to have required, or permitted, Soto to go to trial without counsel would have constituted clear, reversible error. See, e.g. United States* v. *Fay, supra; United States* v. *Curtiss,* 330 F.2d 278 (2d Cir. 1964); *Meeks* v. *Craven, supra.*

369 F. Supp. at 236. So in the instant case, to have permitted petitioners' counsel to withdraw on the day before the trial when petitioners clearly did not wish to represent themselves and before any new counsel had entered his appearance was tantamount to *requiring* petitioners to go to trial without counsel and abrogated their Sixth Amendment right to counsel.

These conflicts between the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, and the federal decisions cited *supra,* justify the grant of certiorari to review the judgment below.

II. The Decision Below Raises an Important Question of Federal Constitutional Law as to the Proper Interpretation of the Sixth Amendment Right to Confrontation and Cross-Examination to Show Prejudice, Interest or Bias of Prosecution Witnesses.

On September 11, 1974, the record reflects that Attorney Alch, in open Court, stated as one of the grounds of his refusal to enter his appearance on that date and imme-

diately commence trial was that Judge Clyne had advised, akin to a pretrial ruling, that he would exclude all evidence of the alleged brutality inflicted upon petitioners by New York State Troopers at the time of their arrest and the obtaining of alleged confessions from them. Judge Clyne stated that said evidence raised a collateral issue and was irrelevant in view of the prosecution's voluntarily suppressing the alleged confessions. Judge Clyne ruled further that he would not permit the introduction of this evidence or the fact that petitioners had instituted a Civil Rights Action against eighteen New York Troopers in order to show prejudice, interest or bias of those officers, nine of whom did in fact testify at trial on behalf of the People.

In affirming petitioners' convictions the Appellate Division stated that the trial judge had merely expressed doubt as to the admissibility of such evidence in a chambers discussion and that the "tentative determination never became a subject of a formal ruling and cannot be raised on appeal."

The transcript of the September 11, 1975, hearing in open court, however, confirms the fact that the trial judge had previously ruled that he would not permit the introduction of such evidence. The "tentative determination" made by Judge Clyne was not as to whether he would permit the introduction of this evidence but whether, having excluded it, he would permit the introduction of a specific offer of proof which Mr. Alch explained he would feel compelled to make in order to protect the record.

> The Court: What authority is there in New York law for an offer of proof on the part of a defendant?
>
> • • •
>
> The Court: I see nothing in the Criminal Procedure Law permitting such offer.
>
> • • •

> The Court: (Continuing) If you would give me authority I will be bound by it.

(T. 11. 14-16).

If there was any doubt as to whether the trial judge deemed his ruling to have been a definitive ruling on the admissibility of the alleged brutality and the institution of the Civil Rights Action to show interest, bias or prejudice, it was dispelled the following day after the trial commenced. After the jury selection but prior to the commencement of evidence, petitioner Lutz stated to the Court as follows:

> If we had a lawyer who was adequately prepared, we would ask him to offer into evidence facts concerning brutality of the State Police against us on the issue of bias.

(T.T. 333). Judge Clyne immediately responded:

> All right, we went — just a minute — we went through that yesterday. Mr. Walch [sic Alch] made that statement on the record what he intended to show.

(T.T. 333).

In view of the foregoing it is respectfully submitted that the record was adequately protected, that this evidentiary issue had in fact been the subject of a definitive ruling and was properly raised on appeal.

The federal courts and indeed this very Court have long held that the constitutional right of a criminal accused to be confronted with witnesses against him is secured for all defendants in state as well as federal criminal proceedings. *Davis* v. *Alaska,* —— U.S. ——, 94 S. Ct. 1105 (1974); *Pointer* v. *Texas,* 380 U.S. 400 (1965). Inextricably

intertwined and integral to the right of confrontation, indeed, a primary interest secured by this right, is the right of cross-examination. *Davis* v. *Alaska, supra; Douglas* v. *Alabama,* 380 U.S. 415, 418 (1965).

As this Honorable Court stated in *Davis* v. *Alaska*:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed to revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. [citation omitted]. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

—— U.S. ——, 94 S. Ct. at 1110. Further, where effective and relevant cross-examination is denied it is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 94 S. Ct. at 1111 citing *Brookhart* v. *Janis*, 384 U.S. 1, 3; *Smith* v. *Illinois,* 390 U.S. 129, 131 (1968).

In the instant case, it can hardly be seriously controverted that evidence of vicious beatings inflicted upon petitioners by those arresting officers who were prosecution witnesses, and evidence that petitioners had instituted a civil action against them, was directly relevant to the possible interest, bias or prejudice of those witnesses.

In addition, petitioners contend that they should have been able to call as witnesses those State Troopers who were named as civil defendants by petitioners but who were not called as witnesses for the prosecution in order

to enable petitioners to demonstrate the interest, bias and prejudice of the prosecution's testimonial evidence. *United States* v. *Haggett,* 438 F.2d 396 (2d Cir. 1971).

> . . . 'bias or interest of a witness is not a collateral issue, and . . . extrinsic evidence is admissible thereon.'

Id. at 399 quoting *United States* v. *Battaglia,* 394 F.2d 304, 314, n. 7 (7th Cir. 1968). Indeed, even the New York State courts generally recognize that while a trial judge may in his discretion limit the *extent* to which he will permit independent evidence to show hostility, he may not as in the instant case exclude all such evidence for that purpose. *People* v. *McDowell,* 210 N.Y.S. 2d 514, 9 N.Y.2d 12 (1961).

In *Villaroman* v. *United States,* 184 F.2d 261 (D.C. Cir. 1950) the Court reversed a defendant's conviction for assault with a dangerous weapon when the trial court had refused to permit the defendant to cross-examine the complaining witness about a pending civil suit which the complainant had filed against him seeking $50,000 in damages for personal injuries.

> The court refused to allow any reference to the suit by cross-examination or otherwise, upon the theory that it was irrelevant. This, we think, was prejudicial and reversible error. Bias of a witness is always relevant.

Id. at 262, citing numerous cases.

> 'A wide range of cross-examination should be allowed to show the *motive, interest,* or animus of a witness.'

Id. citing numerous cases.

In the instant case, although the petitioners did not defend themselves and conducted no cross-examination, it is clear that they desired counsel to cross-examine prosecution witnesses on this critical area of interest, motive or bias. It is equally clear that the judge had ruled on the admissibility of such evidence and not only was there to be no wide-range of cross-examination permitted, *Villaroman, supra,* but the scope of permissible cross-examination on this issue was non-existent.

Conclusion

For the foregoing reasons and upon the authorities above cited, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department.

Respectfully submitted,

GERALD ALCH, ESQUIRE
One Center Plaza
Boston, Massachusetts 02108
Attorney for Petitioners

August 12, 1975

APPENDIX

SUPREME COURT — APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

#24103
#24103-A

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
v.
ROBERT J. DE CHIARO et al.,
APPELLANTS.

DECISION
May 8, 1975.

Judgments affirmed.

Opinion per LARKIN, J.

HERLIHY, P. J., GREENBLOTT, MAIN *and* REYNOLDS, JJ., concur.

STATE OF NEW YORK
SUPREME COURT — APPELLATE DIVISION
THIRD DEPARTMENT

#24103
#24103-A

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
– against –
ROBERT J. DE CHIARO et al.,
APPELLANTS.

Argued, March 6, 1975.
Before:
HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. ROBERT G. MAIN,
HON. JOHN L. LARKIN,
HON. WALTER B. REYNOLDS,
Associate Justices.

APPEAL from judgments of the County Court of Rensselaer County (John J. Clyne, J.), rendered September 30, 1974, upon a verdict convicting defendants of the crimes of burglary in the first degree and attempted robbery in the first degree.

KOHN, BOOKSTEIN & KARP (Gerald Alch, One Center Plaza, Boston, Massachusetts admitted pro hac vice, for appellants, 100 State Street, Albany, New York 12207.

DONALD J. SHANLEY, Special Prosecutor, for respondent, 35 First Street, Troy, New York 12180.

OPINION FOR AFFIRMANCE

#24103
#24103-A

LARKIN, J.

The testimony in this case is that the State Police, acting on intelligence that there would be a robbery or burglary at a hotel in Rensselaer County, staked out the premises. On the night of January 27, 1973 defendants, one of whom was armed, appeared at the hotel and entered through a window. They were caught inside the beams of police flashlights and recognized from pictures previously given to the police. Gunfire followed their refusal to heed State Police commands and the defendants escaped, only to be tracked through deep snow and captured a few hours later.

Defendants were indicted for the crimes of burglary in the first degree and attempted robbery in the first degree.

Shortly after their arrest, defendant Lutz retained attorney E. Stewart Jones, Jr., and defendant DeChiaro retained attorney Thomas J. O'Connor, both of whom represented the defendants from February, 1973 until September, 1974. The conduct of the defense included participation in a preliminary hearing and motions for discovery and inspection, bills of particulars, suppression of identification testimony and suppression of alleged confessions. The attorneys further moved for dismissal of the indictment on the ground of selective prosecution, moved in this court for a change of venue, engaged in plea-bargaining and finally participated in the identification hearing on the eve of trial.

During mid-August, 1974 defense counsel and the special prosecutor were advised by the Trial Judge that this case would be the first one reached at the September, 1974 Trial Term. The identification hearing, which was to be followed by the trial, commenced on September 9, 1974 and at its continuation on the morning of September 10, 1974 defend-

ants discharged their respective counsel and announced their retention of a new firm. The sole reason given by defendant Lutz was an alleged conflict of interest because Mr. Jones had, since March, 1974, served as a special prosecutor in Rensselaer County. Defendant DeChiaro implied a conflict on the part of Mr. O'Connor because of his association with Mr. Jones. A motion for a continuance was denied.

The identification hearing concluded without further representation of the defendants as they would not proceed with their former attorneys. Upon the new attorney's appearance late the next afternoon the court directed that a notice of appearance be filed and a jury selected the following day, with the trial to commence on the following Monday, several days hence. On the new attorney's refusal to appear under such terms, the court advised the defendants to reconsider and go to trial with the original attorneys. Defendants refused and the court appointed the original attorneys. Both they and the defendants objected to the appointments and ultimately the court advised the defendants that they were now without attorneys. Prior to the commencement of the trial, the defendants elected to proceed without counsel although during the voir dire they attempted to change their position. The trial commenced the next morning without defense counsel and the defendants, not participating in the trial, were convicted of the crimes for which they were indicted.

Defendants urge that the denial of their absolute right to counsel of their own choosing mandates reversal. We recognize that a defendant possesses the right to defend in person or by counsel of his own choosing (N.Y. Const., art. I, § 60; *People* v. *McIntyre,* 36 N.Y. 2d 10; *People* v. *McLaughlin,* 291 N.Y. 480).

A defendant has a right to counsel of his own choosing and, thus, the corollary right to change counsel at any

moment from the time of retention of counsel up to and including the course of trial, for good cause. A defendant's right to counsel of his own choosing includes the right to change counsel at any time, without good cause, for any reason, or for no reason, if such change of counsel does not unreasonably interfere with the orderly course of the trial.

The record herein does not support the discharge of the attorneys for good cause. It appears that Mr. Jones, who had been retained by defendant Lutz shortly after his arrest in January, 1973 had appeared at a later date as a special prosecutor for Rensselaer County in an unrelated case and had completed his duties in that capacity some time prior to the date of trial herein. He had, of course, continually represented defendant Lutz from the date of his retention up to the point of discharge as herein related. There is nothing in this record that would indicate prejudice or conflict of interest on the part of Mr. Jones because he was a special prosecutor at an earlier date in an unrelated case. There was no claim that the defendants were not represented by competent, able counsel. The record speaks otherwise.

The last minute attempt by defendants to obtain other counsel was an effort to unreasonably interfere with the orderly course of the trial. The constitutional guarantees of counsel of defendant's own choosing and a reasonable time to prepare for trial with that counsel's assistance cannot be invoked to delay the course of justice (*People* v. *Brabson,* 9 N.Y. 2d 173; *People* v. *McLaughlin, supra*; *People* v. *Mooney,* 18 A.D. 2d 1112). In the instant case, in requesting a seven-day adjournment as a condition for his appearance, the new counsel stated that being ready for trial is a subjective matter of conscience and that he could not appear until he felt personally ready to proceed. It is patent that a defendant's attorney cannot arbitrarily determine the date of trial, especially, as in this case, with

the defendants out on bail, for the control of criminal calendars in this State rests with the judiciary.

The right to counsel does not include the right to delay (*People* v. *Reynolds,* 39 A.D. 2d 812). Under the facts in this case, the court's directions to the new attorney were reasonable. Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel (*People* v. *Higgins,* 23 A.D. 2d 504). To overturn a verdict solely because the defendants elected to proceed without counsel could result in playing into the hands of experienced and wily defendants who refuse counsel in order to lay the foundation for a mistrial or a later attack on the conviction (*Sanchez* v. *United States,* 311 F.2d 327, *cert. den.* 373 U.S. 949).

The further contention advanced by defendants is that the trial court erred by refusing to admit, on the issue of bias, evidence of alleged brutality to the defendants by New York State Troopers. Defendants never attempted to offer such evidence. They rely on the fact that when such testimony was discussed in chambers, the Trial Judge expressed doubt as to its admissibility. Suffice to say that this tentative determination never became a subject of a formal ruling and cannot be raised upon appeal. In view of the overwhelming proof of the guilt of the defendants apparent from this record, the convictions should not be overturned (*People* v. *Brosnan,* 32 N.Y. 2d 254; CPL 470.05).

The judgments should be affirmed.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
– against –
ROBERT J. DE CHIARO and ROBERT G. LUTZ
APPELLANTS.

Before: HON. HUGH R. JONES, *Associate Judge*

CERTIFICATE DENYING LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York, May 16, 1975

(s) HUGH R. JONES
Associate Judge

* Description of Order: Order of Appellate Division, Third Department, entered May 12, 1975, affirming a judgment of County Court, Rensselaer County, rendered September 30, 1974 [conviction of burglary first degree, and attempted robbery first degree].